UPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 960

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COLBERG, INC., et al.,
Plaintiffs and Appellants,
vs.
STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

STEPHENS MARINE, INC.,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

CONSOLIDATED CASES

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Federal questions presented	3
Statement of the case	3
Argument	6
Reasons for granting the writ	10
Conclusion	14

Table of Authorities Cited

Cases	Page
Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818	6
Blanc v. Klumpke, 29 C. 159	7
Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P. 2d 719, 39 Cal. Rptr. 903	7
City of Los Angeles v. Aitken, 10 C.A. 2d 460, 52 P. 2d 585	7
Clement v. State Reclamation Board, 35 Cal. 2d 628, 226 P. 2d 897	10
S. F. Sav. Union v. R. G. R. Petroleum Co., 144 C. 134, 77 P. 823	7
Shirley v. Bishop, 67 C. 543, 8 P. 82	7
U.S. v. 412.715 Acres of Land, 53 F. Supp. 143	9
United States v. Gerlach Livestock Co., 339 U.S. 725, 94 L. Ed. 1231, 20 A.L.R. 2d 633	9
Valenta v. County of Los Angeles, 61 Cal. 2d 669, 394 P. 2d 725, 39 Cal. Rptr. 909	6

Constitutions	
United States Constitution, Fourteenth Amendment	13

Rules	
California Rules of Court, Rule 24	2

Statutes	
28 U.S.C. 1257(3)	2

Texts	
Gould on Waters, 3rd Ed., Section 149	7

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State of California

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

(1) This action was originally decided by a judgment on the pleadings in the trial Court which was adverse to Petitioners. This opinion of the Superior Court of the State of California for the County of San Joaquin was dated May 24, 1965, and is unreported. A copy of this judgment is attached as Appendix A, Exhibit (1).

(2) The decision of the Court of Appeal of the State of California in and for the Third Appellate District was in favor of the Petitioners by a unanimous Court. This was entered December 1, 1966. It is not reported in the Official California Reports, but is reported in 55 Cal. Rptr. 159. A copy of this opinion is attached as Appendix A, Exhibit (2).

(3) The decision of the Supreme Court of the State of California was adverse to the Petitioners by a divided Court with two justices dissenting. The decision was entered October 3, 1967, and a rehearing was denied November 1, 1967, with a remittitur issuing to the trial Court affirming the original judgment on November 3, 1967. A copy of the majority opinion is attached as Appendix A, Exhibit (3). A copy of the dissenting opinion is attached as Appendix A, Exhibit (4). The decision of the Supreme Court of the State of California became final November 3, 1967. (California Rules of Court, Rule 24.)

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3).

FEDERAL QUESTIONS PRESENTED

Two federal questions are presented. These are:

(1) Whether the Petitioners have been denied due process of law under the Fourteenth Amendment to the United States Constitution by the taking of their property without compensation.

(2) Whether the right of a state to control navigable waterways is greater in scope than that of the federal government and permits the taking of private rights of access to navigable waterways under the navigation servitude in an instance where the taking is for a purpose unrelated to the control, regulation, or improvement of navigation.

(3) The federal questions have been raised at every stage of the proceedings in the state Courts and are fundamental to the issues decided. At all times during the proceedings, the Petitioners have claimed that their property rights could not be taken for public use without compensation. At all times during the proceedings, the Petitioners have claimed that the right of the state or federal government to control navigation would not permit the taking or damaging of their property rights for a non-navigational purpose.

STATEMENT OF THE CASE

The Petitioners are two shipyard owners. For more than 60 years, they have conducted neighboring shipyards in the City of Stockton and engaged in the building and repairing of ocean-going ships, yachts

and other vessels. The Colberg yard occupies about 8 acres and the Stephens yard about 6. Both yards are situated on the Upper Stockton Channel, a natural, navigable waterway extending easterly from the turning basin of the Port of Stockton. The channel comes to a dead end about 5,000 feet east of the turning basin. Ocean-going and smaller vessels use the Upper Stockton Channel to pass between Petitioners' yards and the turning basin, from which they may navigate to the sea by way of the Stockton Deep Water Channel, Carquinez Straits and San Francisco Bay. Both yards are improved with marine ways, buildings, docks and allied facilities. Both are riparian to the Upper Stockton Channel.

In the Appendix are exhibits which illustrate the location of the yards and the construction proposed by the State of California.

Appendix B, Exhibit (1) is a map showing the Upper Stockton Channel and the course of navigation from there to the Pacific Ocean.

Appendix B, Exhibit (2) is a map of the Upper Stockton Channel showing the location of the proposed highway bridge in relation to the shipyards. On the exhibit number 49 is the Colberg yard and number 53 is the Stephens yard.

Appendix B, Exhibit (3) is an aerial photograph looking from West to East showing all facilities on the dead-end channel.

Appendix B, Exhibit (4) is an aerial photograph showing the location of the Colberg yard in relation to the proposed bridge.

The State of California proposes to construct twin freeway bridges across the Upper Stockton Channel between Petitioners' shipyards and the turning basin. The bridges will be approximately five hundred feet from the yards. These will be stationary bridges with a vertical clearance of 45 feet above water level. In conformity with federal law, the state applied for and received a permit from the Secretary of the Army and the Chief of the Corps of Engineers, specifying the 45-foot clearance. The bridge will prevent ships over 45 feet in height from passing through the channel to the shipyards. The present height restriction between the shipyards and the ocean is 135 feet, established by the twin bridges over Carquinez Straits.

The two shipyards are located on a natural *cul-de-sac*. They are the only members of the public that will be adversly affected by the construction. Other users of the short channel are unaffected by the restrictive bridge height.

Eighty one percent of the Colberg gross business involves ships that will be unable to reach its yard after the bridges are installed. The pleadings in the action establish that Colberg will lose the fair market value of its shipyard in excess of $3,000,000. The Stephens loss is alleged to be in excess of $1,400,000.

The procedural posture of the instant case is one for declaratory relief brought under the California statute that permits such a proceeding. All three of the California Courts have approved the procedure followed. The Petitioners are not seeking damages in the instant case for the loss of their land. The relief

sought is limited to a determination as to whether there has been any invasion of the Petitioners' property rights which requires compensation from the state.

ARGUMENT

It must be emphasized that the Petitioners are not contending that they have any right to compensation due to the loss of the *public* right of navigation. They do contend, however, that due to the cul-de-sac formed by the short channel upon which they are located, and the near proximity of the bridge construction to their shipyards, that they will lose *private* rights of access to the waterway which are compensable.

The full impact of the damage done by the bridge construction falls upon the two Petitioners, and upon them alone. No other person or entity will be damaged by the restricted access. The general public will benefit from the highway construction at the expense of the two private companies.

In *Bacich v. Board of Control,* 23 Cal. 2d 343, 144 P. 2d 818, the California Supreme Court had decided in 1943 that where the construction of the approaches to the Oakland Bay Bridge obstructed *highway* access rights of private owners, that the loss of such rights *were* compensable. This decision has subsequently been approved in the later cases of *Valenta v. County of Los Angeles,* 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394

P. 2d 725, and *Breidert v. Southern Pac. Co.,* 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P. 2d 719.

Navigable waterways are highways of commerce no less than freeways constructed by the state. In the instant case the Petitioners contend that their rights of access are likewise compensable. A littoral owner on a navigable waterway has a private right of access from his upland to the navigable channel. (*S.F. Sav. Union v. R.G.R. Petroleum Co.,* 144 C. 134, 77 P. 823; *Shirley v. Bishop,* 67 C. 543, 8 P. 82; *Blanc v. Klumpke,* 29 C. 159; *City of Los Angeles v. Aitken,* 10 C.A. 2d 460, 52 P. 2d 585; See Gould on Waters (3rd ed. sec. 149).) The access right of a littoral owner is to be able to reach the navigable portion of the water where it borders his real property. Such a right means nothing to such an owner, however, if that is as far as he can go. Under the facts of the instant case, the Petitioners could launch ships in front of their property, but they could go no further.

The opinion of the Third District Court of Appeal for the State of California recognizes this right and the invasion thereof by the construction of the bridges in its opinion attached as Appendix A, Exhibit (2).

The California Supreme Court did not decide this property question. (See page 28, Appendix A, Exhibit (3).) The majority of the Court held that whether the Petitioners had property rights or not, the State of California could obstruct the navigable waterway for a purpose which had no connection with navigation whatsoever. It recognized that the federal government would have no such power under

navigation servitude derived from the Commerce Clause of the United States Constitution. (See pages 29-30, Appendix A, Exhibit (3).) The majority held that the State of California could obstruct a navigable waterway with a freeway bridge regardless of any private rights involved.

The critical language of the majority opinion appears on page 33 of Appendix A, Exhibit (3), where the Court states:

> "We have referred above to the paramount supervisory power of the federal government over navigable waters. This power, though superior to that of the state, is not grounded in ownership of the navigable waterways upon which it operates, but rather derives from the commerce clause of the United States Constitution, and it has been stated that it may properly be exercised *only* in order to aid navigation (citing cases) * *. *"

And on pages 34-35 of the same opinion:

> "As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse."

The federal decisions have held that where private property rights are taken under the proper exercise of the navigation servitude that no compensation need

be paid to the private owner. Petitioners agree with the majority of the California Supreme Court that where the taking or damage *is not done* for a purpose of regulating or improving navigation that the federal decisions require that compensation be paid. Cases illustrating this are *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 94 L. ed. 1231, 20 A.L.R. 2d 633 (taking for purposes of reclamation, not navigation) and *U.S. v. 412.715 Acres of Land,* 53 F. Supp. 143 (taking for purposes of a Navy Yard, not navigation).

In the instant case state ownership of the submerged portion of the channel involved was never raised by the pleadings upon which the matter was decided. The California Supreme Court interjected this concept of ownership to provide a foundation for its distinction between the powers of the federal government and the powers of the states over navigable waterways. Judicial notice could not have been taken of state ownership of the submerged lands as there are various private ownerships of submerged lands in California that were acquired by Mexican grant prior to the entry of the State of California into the Federal Union. The bottom of the channel involved in the present case is actually privately owned, as the Petitioners have pointed out to the California Supreme Court in their Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

It is of importance to determine if the majority of the California Supreme Court is correct in holding that the State of California has a broader power to control navigable waterways than does the federal government. If this decision is permitted to stand, situations could arise where a state could obstruct navigation for commercial or industrial purposes unrelated to navigation where the federal government could not.

The fundamental issue in the case, however, does not depend upon technical interpretations of rights of access or of the scope of the navigational servitude. The basic problem is the extent to which the courts will stand as a bulwark against the taking of private property by the executive branches of the government without compensation. As the California Supreme Court itself has stated:

> "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." (*Clement v. State Reclamation Board,* 35 Cal. 2d 628 at p. 642, 226 P. 2d 897.)

There is no conflict in the facts but what these two well established shipyards will be destroyed without compensation. The mere statement of this fact illustrates the injustice of the decision under review. This impact upon the Petitioners is for the public good in general, but it falls entirely upon the Petitioners alone.

No specter is raised of the accrual of numerous claims for compensation where a bridge is constructed across a busy artery of navigation. Congress has delegated the authority to the Secretary of the Army to make the determination of bridge heights across navigable waterways. This provides a screening process whereby the demands of public navigation are weighed against the cost of a higher bridge. If public navigation is substantial, this preliminary screening will result in the requirement of a bridge of a type that will conform with the needs of such navigation. Where the restrictive effect of a low bridge, however, falls only upon a few the Secretary may determine that the lower bridge is in the greater public interest. In such a situation, there is no machinery in the legislation which would permit the Secretary to either advise, or fix, compensation for the private members of the public whose property is damaged by the restrictive construction.

By a unanimous decision, the Court of Appeal of the State of California for the Third Appellate District recognized this fundamental problem requiring just compensation in the case at bar. (See Appendix A, Exhibit (2), pages 12-14.) There it was stated:

> "Viewed in the light of the economic balancing criterion, the present injuries are sharply focused on two properties. They arouse no concern for the public purse beyond that involved in any eminent domain proceeding. While shared with the general public, marine passage along Upper Stockton Channel without a height restriction is a unique economic attribute of two

commercial shipyards located on a marine cul-de-sac. The prospect of damage claims from the two owners is not so monumental as to discourage the freeway project of which the bridges are a part. The taxpayers can absorb the cost with far less hardship than the owners. (Albers v. County of Los Angeles, supra, 62 Cal. 2d at p. 263.)

The selection between a low level bridge and reasonable alternatives is essentially a budgetary and planning choice by the administrator. Potential damage to the littoral owners may approach the cost of raising the bridge level. At that point the administrator starts thinking of an acceptable alternative, for example, a higher bridge. Intangible community values imperiled by the extended ramps of a high bridge may impel his return to the low level design. Whatever motivates the administrator to choose a low level bridge, dollars or intangible community values, the individual property owner 'if uncompensated would contribute more than his proper share to the public undertaking.' (Clement v. State Reclamation Board, supra, 35 Cal. 2d at p. 642).

The specter of widespread damage claims caused by a bridge athwart a busy artery of marine commerce arouses no policy tremors. Potential economic injuries from obstructions to navigation are limited by federal statutes investing the Chief of Engineers and the Secretary of the Army with discretionary permit powers in the interest of protecting navigation. (See 33 U.S.C. Sec. 401, 403; Ryan v. Chicago, B. & Q. R. Co., 59 F. 2d 137, 142.) Unless the federal officials

> abdicate their responsibilities, a low level, drawless bridge across the Carquinez Straits or the mouth of the Mississippi is a theoretical but not practical possibility. It is reasonable to suggest that the present bridge project merited a federal permit only because the 45-foot limitation on navigation had narrow economic impact on two shipyards located on a marine cul-de-sac; that at some point potential injury to additional maritime interests would provoke denial of a federal permit. Injury claims remaining after the federal screening must then pass a second screening, that imposed by the economic balancing test, which measures the limit of compensability under the California Constitution. Finally, the claim must pass the substantial impairment test. These successive filters prevent compensable injuries to navigation so widely diffused that they are more public than private."

Of interest is the fact that the three justices of the California Court of Appeal unanimously determined that the damage to the Petitioners was compensable. With them two justices of the California Supreme Court agreed. (See Dissenting Opinion, Appendix A, Exhibit (4).) The majority of five justices of the California Supreme Court disagreed, and determined that no compensation could be paid to Petitioners. This illustrates the difficulty of determining the issues involved in the case at bar and also the public policy problems that are presented.

It is the Petitioners' conception that the due process clause of the Fourteenth Amendment to the United States Constitution includes within its

guarantees the fundamental right set forth in both the federal and state constitutions that private property shall not be taken without just compensation.

For this primary reason we seek to invoke this Honorable Court's jurisdiction and pray that the writ issue. The problem presented in the instant case has far-reaching implications both to governmental entities and private persons where highway bridges are required as a part of the national expansion of highways.

It is important to determine whether or not there are any private property rights which can be affected by the curtailment of navigation by bridge construction.

It is also of great importance to determine if the majority of the California Supreme Court is correct in holding that the State of California has a broader power to control navigable waterways than does the federal government. If this decision is permitted to stand, situations could arise where a state could obstruct navigation for commercial purposes unrelated to waterborne commerce, where the federal government could not.

CONCLUSION

The case has been extensively briefed in the state courts and the Petitioners will not restate the extensive arguments here which will be included in the certified record of the California Supreme Court on file. However, the effect of the state court's decision is as follows:

1. To deprive Petitioners of the land and property rights without compensation in violation of the guarantees of the Fourteenth Amendment to the United States Constitution.

2. To deprive Petitioners of procedural due process under the Fourteenth Amendment to the United States Constitution by taking judicial notice of the fact that the submerged lands involved were owned by the State of California, where in fact they were not, and the issue of their ownership was not in evidence in the case.

3. To extend erroneously the rights of a state government under the navigation servitude by declaring that the federal government is limited to projects which improve or regulate navigation, but determining that a state may obstruct navigable waterways for purposes which are entirely unrelated to navigation.

Wherefore, Petitioners pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California.

Dated, December 11, 1967.

Respectfully submitted,
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(Appendices Follow)